

Is Stare Decisis Still the Lighthouse Beacon of Supreme Court Jurisprudence?: A Critical Analysis

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“‘Twill be recorded for a precedent[,] [a]nd many an error by the same example [w]ill rush into the state.’”¹

Shakespeare had concern as to the mischief that might be done in the name of judicial precedent. In one of his most acrimonious passages, Jonathan Swift assails the legal system for taking “special [c]are to record all the [d]ecisions formerly made against common [j]ustice and the general [r]eason of [m]ankind [and producing these] under the [n]ame of [*p*]recedents . . . as [a]uthorities to justify the most iniquitous [o]pinions.”² Swift’s diatribe, as well as Shakespeare’s colloquy, is directed at the hallmark of the American common law system, the venerable doctrine of stare decisis.³

¹ WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 4, sc. 1 (Jay L. Halio ed., Oxford Univ. Press 1993).

² JONATHAN SWIFT, *GULLIVER’S TRAVELS AND OTHER WRITINGS* 203 (The Modern Library 1988).

³ The doctrine of stare decisis represents the general proposition that a precedent must be followed unless there is a cogent reason to overrule it. See Amy L. Padden, Note, *Overruling Decisions in the Supreme Court: The Role of a Decision’s Vote, Age, and Subject Matter in the Application of Stare Decisis After Payne v. Tennessee*, 82 GEO. L.J. 1689, 1689 (1994). The doctrine of stare decisis takes its name from the Latin phrase “*stare decisis et non queta movere*” that translates as “stand by the thing decided and do not disturb the calm.” *Id.* The doctrine of stare decisis is deeply rooted and prominent in American jurisprudence. See *id.* Justice Harlan articulated the basic tenets underpinning the doctrine of stare decisis:

Very weighty considerations underlie the principle that courts should not lightly overrule past decisions. Among these are [1] the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; [2] the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and [3] the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments.

Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403 (1970). The Court has noted in past decisions that stare decisis “is a principle of policy.” *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)). The doctrine of stare decisis “is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right.” *Burnet v. Coronado Oil & Gas Co.*,

Vertical stare decisis is the policy that a lower court follow the decisions of higher courts in its jurisdiction.⁴ Horizontal stare decisis is the rule that a court follow its past decisions.⁵ This Comment will focus on the influence of horizontal stare decisis on the Supreme Court in the twentieth century.⁶

Part I discusses the Court's differing treatment of stare decisis depending on whether a constitutional provision or a statute is at issue. Part II analyzes the pitfalls inherent in the application of the doctrine of stare decisis. Part III explores the Court's most recent decision in which stare decisis played a prominent role, *Hubbard v United States*,⁷ and briefly contrasts the *Hubbard* Court's discussion of statutory stare decisis with the Court's pivotal constitutional stare decisis analysis in *Planned Parenthood v Casey*.⁸ Part IV examines the *Hubbard* decision in light of the *Patterson v McLean Credit*

285 U.S. 393, 406 (1932) (Brandeis, J., dissenting). Adherence to the doctrine of stare decisis promotes stability, predictability, and respect for judicial authority. See *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986).

Stare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process. See *Payne*, 501 U.S. at 827. Many rationales have been proffered to buttress stare decisis including certainty, equality, efficiency, and the appearance of justice. See Padden, *supra*, at 1690. Adherence to stare decisis fosters certainty among individuals and concomitantly allows individuals to order their affairs with the knowledge that the law will be interpreted in the future the same as it is interpreted in the present. See *id.* Stare decisis ensures that "the law will not merely change erratically" and permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals. See *Vasquez*, 474 U.S. at 265.

⁴ See Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2024 (1994) (stating that the American judicial system is based on respect for vertical stare decisis); Lawrence C. Marshall, *Let Congress Do It: The Case for an Absolute Rule of Statutory Decisis*, 88 MICH. L. REV. 177, 237 n.1 (1989) (defining vertical stare decisis as the rule commanding a lower court to follow the decisions of a higher court in its jurisdiction).

⁵ See Peter Wesley-Smith, *Theories of Adjudication and the Status of Stare Decisis*, in PRECEDENT IN LAW 81-82 (Laurence Goldstein ed., 1987). In light of vertical stare decisis, horizontal stare decisis is only applicable as a rule for a court of last resort. See *id.* Furthermore, horizontal stare decisis truly only exists for the Supreme Court because it is the only court that is not subject to appellate review. See *id.*

⁶ See *id.* at 81-82 (defining horizontal stare decisis as the rule that a court follow its past precedent). While stare decisis is an inveterate rule, the Court has recognized its power to overrule a prior decision. See *Helvering v. Hallock*, 309 U.S. 106, 121 (1940); see also James Wm. Moore & Robert Stephen Oglebay, *The Supreme Court, Stare Decisis and Law of the Case*, 21 TEX. L. REV. 514, 523 (1943) (discussing the proper invocation of the doctrine of stare decisis).

⁷ 115 S. Ct. 1754 (1995).

⁸ 505 U.S. 833 (1992).

*Union*⁹ traditional rationales for departing from stare decisis and proposes that the Court, whenever confronted with a stare decisis issue, should apply the *Patterson* rationales to determine whether to overrule past Court decisions.

I. STARE DECISIS FRAMEWORK: STATUTORY VERSUS CONSTITUTIONAL ANALYSIS

Try as the Justices might, they cannot seem to treat the children of American law, constitutional law and statutory law, equally.¹⁰ For that matter, maybe there should be disparate treatment of constitutional law and statutory law by the Court. The Court might continually reexamine constitutional law to determine if the prior interpretation is consistent with notions of justice.¹¹ On the other hand, the Court having once interpreted a statute could then leave subsequent statutory interpretation to Congress.¹² The Court's differing application of stare decisis to statutory interpretation and constitutional interpretation, taken together, demonstrates that the Court has tended to conform to Justice Brandeis's classic proclamation:

[I]n cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.¹³

⁹ 491 U.S. 164 (1989).

¹⁰ See Marshall, *supra* note 4, at 180–81 (pointing out that the Supreme Court has applied different stare decisis analyses based on whether a constitutional question or a statute is at issue).

¹¹ Justice Brandeis argued in his dissent in *Burnet* that stare decisis applied with less vigor in cases involving constitutional issues because in such cases "correction through legislative action is practically impossible." See *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406–08 (1932) (Brandeis, J., dissenting).

¹² Judge Richard A. Posner described his scope of stare decisis review of statutes as follows:

It might be a foolish statute, but (provided it is constitutional—that is, not too foolish, not vicious, and not contrary to one of the specific prohibitions in the Constitution) if it is correctly interpreted and applied, the judges have done their job and no more can be asked.

RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 42 (1990).

¹³ *Burnet*, 285 U.S. at 406–08 (footnotes omitted).

A. *An Analysis of Statutory Stare Decisis and the Congressional Acquiescence Theory*

When the precedent at issue involves statutory interpretation, the Court has traditionally articulated and followed a different approach from constitutional stare decisis.¹⁴ The flip side of the Court's penchant to overrule constitutional precedents has been its particular reticence to overrule precedents interpreting statutes.¹⁵ The benchmark decision of the Court delineating its view on statutory stare decisis was *Erie Railroad v. Tompkins*.¹⁶ The *Erie* Court suggested that it would have been reticent to overrule *Swift v. Tyson*¹⁷ "[i]f only a question of statutory [interpretation] were involved."¹⁸

While the support for a heightened rule for statutory stare decisis has no formal underpinnings in the law, it does have one main truss of support. The main truss is congressional acquiescence,¹⁹ a theory which posits that Congress, by not enacting legislation to reverse the Court's interpretation of a statute, thus signals its approval of that precedent.²⁰

The traditional justification for the heightened rule of statutory stare decisis is that Congress's failure to enact legislation reversing a judicial decision signals Congress's acquiescence to the Court's interpretation of a statute.²¹ The Court, when it invokes a heightened rule of statutory stare decisis, refuses to overrule a statutory precedent even though the Court may be convinced that its earlier interpretation was wrong.²² The Court has intimated that the burden borne by

¹⁴ See Marshall, *supra* note 4, at 181.

¹⁵ See POSNER, *supra* note 12, at 42-53; see also Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 835 (1988) (pointing out that the Court rarely overrules its past decisions interpreting a statute).

¹⁶ 304 U.S. 64, 78 (1938) (holding that there is no general federal common law and that Congress has no power to declare substantive rules of common law applicable in a state).

¹⁷ 41 U.S. 1, 19 (1842) (holding that there was a general federal common law concerning commercial jurisprudence).

¹⁸ *Erie R.R.*, 304 U.S. at 77

¹⁹ See William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1381 (1988) (proposing that statutory stare decisis is supported by congressional acquiescence and illustrates his point by analyzing the baseball antitrust exemption as an inconsistency of long standing that should be remedied by the Congress and not by the Court); Marshall, *supra* note 4, at 184.

²⁰ See Marshall, *supra* note 4, at 184.

²¹ See *id.*, see also Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 MICH. L. REV. 245, 245 (1995) (advocating that a precedent should not be overruled unless clear error is present).

²² See Marshall, *supra* note 4, at 186. But see John W. Poulos, *The Judicial Philosophy of Roger Traynor*, 46 HASTINGS L.J. 1643, 1658 (1995) (arguing that stare decisis should be

the party advocating the abandonment of an established precedent is great where the Court is asked to overrule a point of statutory interpretation.²³ Considerations of stare decisis have added force in the area of statutory interpretation because, unlike in the area of constitutional interpretation, the legislative power is implicated, and Congress remains uninhibited to alter what the Court has done.²⁴

B. Three Flaws in the Congressional Acquiescence Theory

However, to explain the reasoning of the congressional acquiescence theory is to expose its illogic.²⁵ The theory of congressional acquiescence has long been ostracized for its unrealistic assumptions about the legislative process.²⁶ The theory of congressional acquiescence is akin to the rhetorical question: If a tree falls in the woods and no one hears it fall, did it make any noise? If the Court decides a statutory interpretation issue and no one immediately objects, does that make it correct?²⁷ The fallacy of a heightened rule for statutory stare

applied when a court is reinterpreting a statute and that stare decisis should be relaxed only in exceptional circumstances). The Poulos article does not explicitly discuss the exceptional circumstances, but I argue that the exceptional circumstances are a generalization of the three *Patterson* rationales.

²³ See *United States v. Johnson*, 481 U.S. 681 (1987). The *Johnson* Court upheld the impugned *Feres* decision, citing the fact that Congress had “recently considered, but not enacted, legislation” that would have partially overruled *Feres v. United States*, 340 U.S. 135 (1950). See *Johnson*, 481 U.S. at 686 n.6. The *Johnson* decision supports the theory that the burden borne by the party advocating the abandonment of an established statutory precedent is great because the Court often defers to Congress, as it did in *Johnson*, instead of undertaking an independent judicial examination of the statute. See Posner, *supra* note 15, at 835.

²⁴ See, e.g., *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424 (1986); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977).

²⁵ See *United States v. Bailey*, 36 F.3d 106, 119 (D.C. Cir. 1994) (Wald, J., dissenting).

²⁶ See Marshall, *supra* note 4, at 186–91 (arguing that the unrealistic assumptions include that Congress is aware of all court decisions interpreting statutes enacted by Congress and that Congress, if it was dissatisfied with the Court’s interpretation of a statute, would be able to overrule the Court by passing a new statute). In light of the legislative process with many different committees and agendas, it does not seem unlikely that a member or even a whole subcommittee might be unaware of the Court’s interpretation of a statute.

²⁷ The quest for justice is not a delimited journey; it is similar to the quest for the definition of obscenity. We may not know what justice is, but we will surely know it when we see it. Cf. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (“I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know when I see it”).

decisis bears itself out when it is considered that Congress is affected by many of the same stumbling blocks affecting all entities in search of perfect information, that is, nescience, quiescence, and irrelevance.²⁸

1. *Nescience as a Flaw in the Congressional Acquiescence Theory*

The principal flaw in interpreting Congress's inaction as an indication of congressional acquiescence is nescience, which is a lack of information on the part of members of Congress about Court decisions.²⁹ "While it is true . . . that a majority of the members of Congress are lawyers, they have not kept up-to-date on recent legal developments."³⁰ To this observation, one might argue that not all members of Congress need to be informed of Court decisions. Instead, perhaps only the committee members that drafted statutes that the Court has erroneously interpreted need to be informed of Court decisions.³¹

However, this refrain plays into the hands of the argument against a heightened rule for statutory stare decisis. If these committee members with their enormous staffs and liaisons cannot monitor judicial decisions, how can noncommittee members be expected to be apprised of Court decisions?³² Does it make sense for the Court to ignore what it thinks was the intent of the entire Congress that enacted a statute in 1870 just because the members of a

²⁸ See Marshall, *supra* note 4, at 186.

²⁹ See *id.* at 186-90; see also THE AMERICAN HERITAGE COLLEGE DICTIONARY 915 (3d ed. 1993) (defining nescience as the "[a]bsence of knowledge or awareness"). While some might argue for the use of nontechnical terms, nescience succinctly describes the situation confronting members of Congress concerning Court decisions.

³⁰ Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587, 609 (1983) (footnote omitted); see also WILLIAM J. KEEFE & MORRIS S. OGUL, THE AMERICAN LEGISLATIVE PROCESS: CONGRESS AND THE STATES 420 (5th ed. 1981) (arguing that legislative bodies rarely concern themselves with activities of the courts); SAMUEL KRISLOV, THE SUPREME COURT IN THE POLITICAL PROCESS 144 (1965) ("No study has been undertaken to estimate the number of Court decisions heavily criticized in Congress, but these would surely constitute a small fraction of the total number. Most never come to the attention of Congress at all."); William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 91 (1988); Abner J. Mikva, *A Reply to Judge Starr's Observations*, 1987 DUKE L.J. 380, 384 (arguing "that most of the time Congress does not read judicial opinions and does not know whether courts properly interpret the statute at issue").

³¹ See Marshall, *supra* note 4, at 186-90. However, this rejoinder is a rhetorical question because often the issue is not whether all members of Congress are unaware of Court decisions, but whether any of the members of Congress are aware of Court decisions. See also *supra* note 30 and accompanying text.

³² See Marshall, *supra* note 4, at 187-89; see also *supra* notes 30-31 and accompanying text.

committee of the current Congress have not taken measures to overrule a 1976 Court decision interpreting an 1870 enactment?³³

The Court's response to the possibility that Congress's acquiescence was a result of nescience rather than a reasoned analysis has been to attribute more significance to inaction where there is some evidence, or at least a strong reason to believe, that a majority of members are aware of the Court decision.³⁴ In the absence of an actual vote by members, it seems unrealistic to assume that members of Congress are made more knowledgeable about a Court decision simply because some committee holds a hearing or some members make speeches about it.³⁵

However, this incremental approach can lead to perverse results.³⁶ If there has been complete congressional silence on an issue, the Court is likely to attribute only minimal significance to Congress's acquiescence, at least as long as the Court is not convinced that members of Congress must have known about the decision.³⁷ It is possible, however, that Congress's complete acquiescence might actually indicate unanimous agreement with the decision, a factor that would be expected to command considerable respect from the Court.³⁸

On the other hand, if a large number of members sponsor an amendment to overrule a decision and that amendment is never passed, the Court is likely to

³³ The time period in question relates to the issue before the Court in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).

³⁴ See, e.g., *Johnson v. Transportation Agency*, 480 U.S. 616, 629–30 n.7 (1987). The *Johnson* Court attributed great weight to Congress's failure to overrule *United Steelworkers v. Weber*, 443 U.S. 193 (1979). The *Johnson* Court believed that Congress was aware of the decision because *Weber* was a widely disseminated decision that addressed an important issue of public interest. See *id.*, see also *supra* notes 30–31 and accompanying text.

³⁵ See Marshall, *supra* note 4, at 189 (arguing that members of Congress with their pressing time demands often do not read committee reports and thus are not informed about Court decisions interpreting statutes). However, this argument fails to address that members of Congress have other methods, often informal, of receiving information about Court decisions. See generally RICHARD F. FENNO, JR., *CONGRESSMEN IN COMMITTEES* 12 (1973) (stating that members of Congress often monitor judicial decisions through discussions with their clerks and other members of Congress).

³⁶ See Marshall, *supra* note 4, at 189.

³⁷ See *id.*, see also *supra* notes 30–31 and accompanying text.

³⁸ See *Girouard v. United States*, 328 U.S. 61, 69 (1946) ("It is at best treacherous to find in [c]ongressional silence alone the adoption of a controlling rule of law."); Marshall, *supra* note 4, at 189. But see *Helvering v. Hallock*, 309 U.S. 106, 119 (1940) ("It would require very persuasive circumstances enveloping [c]ongressional silence to debar this Court from reexamining its own doctrines."). The preceding parentheticals indicate that if the Court is determined to examine precedent, congressional acquiescence will not be an impediment.

attribute great significance to Congress's inaction.³⁹ Paradoxically, Congress's unanimous agreement with a decision may command less respect from the Court than a sharply divided Congress's failure to overrule a decision.⁴⁰ Therefore, it can be argued that nescience does not support the congressional acquiescence theory.⁴¹

2. Quiescence as a Flaw in the Congressional Acquiescence Theory

The possibility of quiescence is a problem, albeit not the most severe, of interpreting congressional acquiescence.⁴² Quiescence, as applied to Congress, is the problem of legislative inaction by members of Congress. Often a member will want to support a statute that would overrule a decision with which the member disagrees, but for reasons running the gamut, from "belief that the [statute] is sound in principle but politically inexpedient to be connected with"⁴³ to "belief that the [statute] is sound in principle but defective in material particulars,"⁴⁴ will fail to support the statute.

Trying to interpret congressional acquiescence from quiescence is like reading a tarot card—one can usually find whatever it is for which he or she is looking.⁴⁵ Members may have many reasons for failing to bring to the floor legislation that they support, such as dealmaking with another member and recognizing that political expediency requires that propounding the statute would not be greeted favorably by other members.⁴⁶

One cannot decipher the intent of Congress from the fact that a statute was never brought to the floor, died in committee, or was defeated in a floor vote.⁴⁷ The point is not that congressional quiescence is wholly superfluous in determining congressional acquiescence; as a matter of logic, it is pertinent.⁴⁸

³⁹ See Marshall, *supra* note 4, at 189–90.

⁴⁰ See *supra* text accompanying note 39.

⁴¹ See Marshall, *supra* note 4, at 186–90.

⁴² See *id.* at 190.

⁴³ Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 1393 (1958) (unpublished manuscript).

⁴⁴ *Id.*

⁴⁵ See *id.* It is very difficult to interpret silence as an indication of one's beliefs. Cf. *United States v. Hoosier*, 542 F.2d 687, 688 (6th Cir. 1976). The court discussed the problem of interpreting silence in light of Federal Rule of Evidence 801(d)(2)(B), which is an admission by a party-opponent, and held that more than mere silence was needed to interpret the appellant's statement. See *id.*

⁴⁶ See Hart & Sacks, *supra* note 43, at 1393–1401.

⁴⁷ See Marshall, *supra* note 4, at 191; see also *supra* text accompanying notes 39 and 46.

⁴⁸ While quiescence is not determinative of congressional agreement, it is a factor for the

However, this pertinence does not *a fortiori* demonstrate that the probability of congressional agreement is sufficient to support any form of a presumption of congressional acquiescence.⁴⁹ Therefore, quiescence is inexact and does not lend support to the congressional acquiescence theory.⁵⁰

3. *Irrelevance as a Flaw in the Congressional Acquiescence Theory*

The final flaw of the congressional acquiescence theory is irrelevance. The cardinal rule of statutory interpretation is that “[i]t is the intent of the Congress that enacted [the statute at issue] that controls.”⁵¹ The Court has generally followed an originalist model of statutory construction by attempting to understand what the Congress that enacted the statute at issue intended to accomplish by the language it chose.⁵² With this originalist model in mind, how do you understand the intent of a Congress that passed a statute in 1870 by examining the congressional acquiescence of a Congress seated in 1976?⁵³ To understand the intent of a Congress, one must search the legislative history⁵⁴ of the statute, contemporaneous remarks of legislators, and early Court interpretations of the statute.⁵⁵

In light of the congressional acquiescence theory’s shortcomings of nescience, quiescence, and irrelevance, the congressional acquiescence theory tends not to offer support for a heightened rule of statutory stare decisis.⁵⁶

Court to consider when deciding a statutory stare decisis issue. *See generally* Runyon v. McCrary, 427 U.S. 160, 174-75 (1976). The Court generally attributes significance to decisions where Congress has actually defeated legislation in response to the Court’s earlier interpretation of a statute. *See id.*; *see also supra* text accompanying notes 39 and 46.

⁴⁹ *See* Marshall, *supra* note 4, at 191.

⁵⁰ *See id.*

⁵¹ Mackey v. Lanier Collection Agency Serv. Inc., 486 U.S. 825, 840 (1988) (quoting International Bhd. of Teamsters v. United States, 431 U.S. 324, 354 n.39 (1977)).

⁵² *See* Marshall, *supra* note 4, at 193; *see also* Posner, *supra* note 15, at 838 (arguing that the best way to determine congressional intent is to examine the plain language of a statute). *See generally* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1184 (examining the plain meaning rule of statutory interpretation).

⁵³ *See* Runyon v. McCrary, 427 U.S. 160, 174 n.11 (1976) (examining the constitutionality of a statute passed in 1870).

⁵⁴ Legislative history is the compilation of records, reports, hearings, and debates leading up to the enactment of a statute. *See* BLACK’S LAW DICTIONARY 900 (6th ed. 1990).

⁵⁵ *See* Marshall, *supra* note 4, at 193.

⁵⁶ *See supra* text accompanying notes 11-55.

C. *An Analysis of Constitutional Stare Decisis*

The Court traditionally has not applied stare decisis as strictly in constitutional cases as in nonconstitutional cases.⁵⁷ However, overruling a constitutional precedent "is a matter of no small import, for 'the doctrine of *stare decisis* is of fundamental importance to the rule of law'"⁵⁸ The Court has held that any departure from the doctrine of constitutional stare decisis demands "special justification."⁵⁹ However, stare decisis concerns are at their zenith in decisions involving property and contract rights regulated by statutes.⁶⁰ The Rehnquist Court, by its inordinate support for statutory stare decisis, has effectively relegated constitutional stare decisis to second-class status.⁶¹ Chief Justice Rehnquist went so far as to state "that precedents affecting individual [constitutional] rights [are] of lesser importance . . . than statutory precedents."⁶²

The Court has reasoned that adherence to precedent is least compelling in constitutional cases because correction through the legislature is virtually unattainable.⁶³ However, this reasoning is inapposite and stare decisis should remain a potent doctrine in those constitutional cases denying individual rights because Congress can still provide statutory protection where once it was constitutional.⁶⁴ Provided the alternative of statutory protection from Congress,

⁵⁷ See *Payne v. Tennessee*, 501 U.S. 808, 842 (1991) (Souter, J., concurring); *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989); *Glidden Co. v. Zdanok*, 370 U.S. 530, 543 (1962); *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405-07 (1932) (Brandeis, J., dissenting); see also Padden, *supra* note 3, at 1723. Chief Justice Rehnquist cited *Payne* for his belief that stare decisis carries less force in constitutional decisionmaking. See *id.* Although Chief Justice Rehnquist seemed to imply that constitutional error was enough by itself to demand the Court to reexamine a decision, he examined the traditional rationales for departing from stare decisis and found that such a departure was justified in *Payne*. See *id.*

⁵⁸ *Payne*, 501 U.S. at 842 (Souter, J., concurring) (quoting *Welsh v. Texas Dep't of Highways*, Pub. Transp., 483 U.S. 468, 494 (1987)).

⁵⁹ See *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)); *infra* Part IV

⁶⁰ See *Payne*, 501 U.S. at 828.

⁶¹ See Bennet L. Gershman, *Judicial 'Conservatism'*, N.Y. L.J., June 21, 1995, at 2.

⁶² *Id.*

⁶³ See Michael Vitiello, *Payne v. Tennessee: A "Stunning Ipse Dixit,"* 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 165, 178 (1994). But see *infra* note 64.

⁶⁴ See Vitiello, *supra* note 63, at 180-81. Congress, by enacting Title VII of the Civil Rights Act of 1964, provided protection to certain classes of individuals against discrimination based on many different factors. Congress made Title VII applicable to areas that the Fourteenth Amendment did not address. See generally Clara J. Montanari, Note, *Supervisor*

the Court is not the only avenue short of constitutional amendment for protecting individual rights, and stare decisis should apply as it would in the statutory context.⁶⁵

II. PITFALLS OF STARE DECISIS

The doctrine of stare decisis can trap the myopic practitioner fixated on archaic decisions, as well as the visionary in search of a utopian legal system devoid of past iniquitous decisions.⁶⁶ The doctrine of stare decisis is a compromise between the past and the future.⁶⁷ As Justice Traynor⁶⁸ phrased the quandary, "If hasty displacement of precedents⁶⁹ should be discouraged, there should be corresponding discouragement of ritual perpetuation of a moribund precedent."⁷⁰

Liability Under Title VII: A "Feel Good" Judicial Decision, 34 DUQ. L. REV. 351, 359 (1996) (arguing that Title VII is applicable to areas of discrimination that the Fourteenth Amendment does not address).

⁶⁵ See *supra* text accompanying note 64.

⁶⁶ See *Religious Liberty and the Bill of Rights: Testimony Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong., 1st Sess. 2-3 (1995) (statement of Professor Michael S. Paulsen of the University of Minnesota Law School). Professor Michael S. Paulsen warned that strictly adhering to stare decisis can lead to inequitable results. A court, instead of correcting an iniquitous decision, blindly follows the decision because of stare decisis. Ultimately, this causes more damage to the justice system due to unfairness perceptions than overruling the decision would have caused in stability perceptions. See *id.*, see also Erin O'Hara, *Social Constraint or Implicit Collusion?: Toward a Game Theoretic Analysis of Stare Decisis*, 24 SETON HALL L. REV. 736, 804 n.26 (1993).

⁶⁷ The Court has been reluctant to overrule past decisions, even where it is clear that a majority of the Justices no longer believe that those decisions embody correct interpretations of the law. See Paulsen, *supra* note 66, at 3. The Court, instead of overruling these erroneous decisions, distinguishes them. See *id.* The result is a comatose body of law that is lingering in its death throes waiting to die. The consequence is frequently confusion. See *id.* Finally, because the Court grants certiorari in less than 1% of cases, the result is that many clearly erroneous past Court decisions are perpetuated under the mantra of stare decisis. See *id.* Ironically, these erroneous past Court decisions gain strength over time similar to the old wives' tale that if you say something enough times, it may come true.

⁶⁸ Chief Justice Traynor was a former justice of the California Supreme Court.

⁶⁹ Precedent is defined as "[c]ourts attempt[ing] to decide cases on the basis of principles established in prior cases." BLACK'S LAW DICTIONARY 1176 (6th ed. 1990). See Ronald Kahn, *The Supreme Court as a (Counter) Majoritarian Institution: Misperceptions of the Warren, Burger, and Rehnquist Courts*, 1994 DET. C.L. REV. 1 (assuming that stare decisis is the same as following precedent).

⁷⁰ Roger J. Traynor, *Transatlantic Reflections on Leeways and Limits of Appellate Courts*, 1980 UTAH L. REV. 255, 263 (footnote added). The Court has explicitly overruled its

The spasmodic way in which the current Justices of the Court and the legal profession manipulate stare decisis is telling.⁷¹ Frequently, stare decisis is paraded out in defense of decisions that could be supported on wholly independent grounds.⁷² At other times, stare decisis seems to be conveniently

prior decisions on innumerable occasions. See, e.g., *Monell v. Department of Social Services*, 436 U.S. 658 (1978), overruling *Monroe v. Pape*, 365 U.S. 167 (1961); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), overruling *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967); *Lodge 76, International Ass'n of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976), overruling *International Union v. Wisconsin Employment Relations Bd.*, 336 U.S. 245 (1949); *Braden v. Thirtieth Judicial Circuit Court*, 410 U.S. 484 (1973), overruling *Ahrens v. Clark*, 335 U.S. 188 (1948); *Andrews v. Louisville & Nashville R.R.*, 406 U.S. 320 (1972), overruling *Moore v. Illinois Central R.R.*, 312 U.S. 630 (1941); *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235 (1970), overruling *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962); *Peyton v. Rowe*, 391 U.S. 54 (1968), overruling *McNally v. Hill*, 293 U.S. 131 (1934); *Brown v. Board of Educ.*, 347 U.S. 483 (1954), overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896).

These divergences from prior Court decisions do not mean that the Court has been apathetic to stare decisis, but only that stare decisis is a "principle of policy and not a mechanical formula." *Boys Markets*, 398 U.S. at 241 (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)). "[T]he careful observer will discern that any detours from the straight path of *stare decisis* in [the Court's] past [has] occurred for articulable reasons, and only when the Court has felt obliged 'to bring its opinions into agreement with experience and with facts newly ascertained.'" *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986) (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)). Respect for the Court must fall when the bar and the public come to comprehend that nothing that has been decided in prior adjudication has force in pending litigation. See *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 113 (1944) (Roberts, J., dissenting).

⁷¹ See Marshall, *supra* note 4, at 177. Justice Frankfurter admonished "that *stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Helvering*, 309 U.S. at 119.

Remaining true to an 'intrinsically sounder' doctrine established in prior cases better serves the values of stare decisis than would following a more recently decided case inconsistent with the decisions that came before it; the latter course would simply compound the error and would likely make the unjustified break from previously established doctrine complete.

Id.

⁷² See Marshall, *supra* note 4, at 177. The legal profession needs to be ever vigilant that stare decisis does not become the lap dog of a languid judiciary. *But see* *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (where Justice O'Connor faced the dilemma of whether to

ignored as an antiquated, rhetorical device that long ago served its purpose.⁷³ In the 1960s, when the Warren Court's power was at its zenith, conservative academicians repeatedly attacked the Warren Court's propensity to overrule precedent.⁷⁴ Under the Rehnquist Court, by contrast, the liberal critics are vituperating the conservative majorities of the Court for failing to adhere to stare decisis.⁷⁵ The friends of stare decisis, in the main, are determined by the needs of the moment.⁷⁶

The uncertainty about the contemporary status of stare decisis is a byproduct of the inexactitude of the doctrine of stare decisis itself.⁷⁷ Stare decisis allows the Court to overrule prior decisions where there is some "special justification,"⁷⁸ a concept that the Court has never fully enunciated.⁷⁹

affirm *Roe v. Wade*, 410 U.S. 113 (1973), solely on constitutional grounds or to buttress the plurality decision by also relying on stare decisis). Courts must balance the inclination to substitute solely the doctrine of stare decisis with examining independent legal arguments to affirm a precedent.

⁷³ See Marshall, *supra* note 4, at 177.

⁷⁴ See *id.* at 177-78; see, e.g., Jerold H. Israel, *Gideon v. Wainwright, The "Art" of Overruling*, 1963 SUP. CT. REV. 211 (discussing *Gideon v. Wainwright*, 372 U.S. 335 (1969), overruling precedent); Philip B. Kurland, *Stare Decisis: What is Past? and What is Prologue?*, 78 HARV. L. REV. 143, 169-75 (1964). During the 16 year reign of the Warren Court, 63 decisions were overruled, and during the 17 years of the Burger Court, 61 decisions were overruled. See Gershman, *supra* note 61, at 2. This equates to about four overrulings a year, which is well within the established bounds of the Court during the twentieth century. See *id.*

⁷⁵ See Marshall, *supra* note 4, at 178. Professor Burt Neuborne of New York University School of Law observes that "[a] judicial activist is an ideologue with five votes [and] what's disturbing is the hypocrisy with which [C]hief [J]ustice [Rehnquist] has waged a lifelong war against judicial activism and then does it once he gets five votes." Marcia Coyle, *Complete Control*, NAT'L L.J., Aug. 19, 1991, at S2. See also Charles J. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 CORNELL L. REV. 401, 401 (1988) (Charles J. Cooper rhetorically asks whether it is not "amusing that liberals, who only recently have perceived the profound value of 'stability of the law,' have taken to lecturing conservatives on what it takes to be a true conservative?"). But see Coyle, *supra*, at 52 (Richard Willard, a Court litigator at Steptoe & Johnson's District of Columbia office, counters that "[t]here's no doctrine of judicial restraint that requires conservative [J]ustices to go along with precedents no matter how wrong they think those decisions may be.").

⁷⁶ See Vitiello, *supra* note 63, at 182.

⁷⁷ See Marshall, *supra* note 4, at 179.

⁷⁸ See *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)); see also Andrew M. Jacobs, *God Save this Postmodern Court: The Death of Necessity and the Transformation of the Supreme Court's Overruling Rhetoric*, 63 U. CIN. L. REV. 1119, 1159 (1995) (discussing the concept of special justification in *Rumsey*).

⁷⁹ See *Rumsey*, 467 U.S. at 212 (stating that any transgression from stare decisis

Because of the imprecise rules for the deployment of stare decisis, "it is often impossible to assess whether a decision has or has not been faithful to the stare decisis principle."⁸⁰ The decline of stare decisis, like the decline of the Roman empire, is in full view of all citizens, yet none are taking up arms to defend this cornerstone of justice.⁸¹

Once some Justices begin to treat precedent lightly, other Justices will be inclined to refuse to follow the dictates of past decisions.⁸² The larger issue that can denigrate the doctrine of stare decisis is that once one majority of Justices overrules decisions of a previous majority, it is almost impossible to demand that successor majorities respect their predecessors' precedents.⁸³

In some respects, these problems are inevitable in a judicial system that attempts to balance the stability of the law with the need to overrule some pernicious precedents.⁸⁴ Unless Americans are willing to abide by decisions such as *Plessy v. Ferguson*,⁸⁵ or are willing to rely on a constitutional amendment to overrule them, stare decisis cannot be immutable.⁸⁶ However, once an absolute rule of stare decisis is dismissed, there is no objective

demands special justification; however, the Court fails to define special justification); *Smith v. Allwright*, 321 U.S. 649, 665 (1944) (implying that deviation from stare decisis requires special justification but does not define parameters of special justification); *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965) (failing to define special justification).

⁸⁰ Marshall, *supra* note 4, at 179 (footnote omitted).

⁸¹ See *id.*

⁸² See *id.*, see also Cooper, *supra* note 75, at 404. Charles J. Cooper states that stare decisis "is inherently subjective, and few judges can resist the natural temptation to manipulate it and its avowed office is to shelter error from correction." *Id.* This statement is a warning to the judiciary that once precedent is altered or distinguished, it loses its precedential value, and ergo, no longer is a basis for future decisions. See *id.*

⁸³ See Marshall, *supra* note 4, at 179; see also Linda Meyer, "Nothing We Say Matters" Teague and New Rules, 61 U. CHI. L. REV. 423, 423 (1994) ("The Court is wearing away at the power of precedent itself, stripping prior cases of all persuasive force beyond their particular factual contexts.").

⁸⁴ See Marshall, *supra* note 4, at 179.

⁸⁵ 163 U.S. 537 (1896) (requiring separate but equal accommodations aboard passenger trains for African-Americans). However, separate but equal accommodations are usually anything but equal. See generally Sara L. Mandelbaum, *A Judicial Blow for "Jane Crowism" at The Citadel in Faulkner v. Jones*, 15 N. ILL. U. L. REV. 3, 4 (1994) (arguing that the program accommodations at Mary Baldwin College, a female only military institution was separate but not equal to the male cadets' program and accommodations at VMI).

⁸⁶ See Eskridge, Jr., *supra* note 19, at 1361 (stating that while stare decisis supports the constancy of judicial decisions as a path to preserving public respect for the judiciary and to safeguard the reliance interests of persons, these decisions must occasionally yield and change). "Stare decisis is not an inexorable command." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405 (1932) (Brandeis, J., dissenting).

yardstick for measuring adherence to the rule of precedent.⁸⁷

III. THE COURT'S RECENT TREATMENT OF STARE DECISIS: FROM *PLANNED PARENTHOOD* TO *HUBBARD*

A. *The Court's Treatment of Constitutional Stare Decisis in Planned Parenthood v. Casey*

In *Planned Parenthood v. Casey*,⁸⁸ Justice O'Connor⁸⁹ wrote at length about the importance of stare decisis and ultimately upheld *Roe v. Wade* based on constitutional stare decisis.⁹⁰ Justice O'Connor's stare decisis analysis began with the observation that "no judicial system could do society's work if it eyed each issue afresh in every case that raised it."⁹¹ She weighed a woman's reliance interest on the right to terminate her pregnancy developed over the eighteen years since *Roe* against "whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine."⁹² In a lengthy discussion of the role of stare decisis in *Roe*, Justice O'Connor held for the Court that based on the doctrine of stare decisis, the correct decision was to reaffirm *Roe*, but redefine *Roe*'s parameters.⁹³

Justice O'Connor's opinion is significant for its lengthy discussion of stare decisis in a constitutional interpretation. However, Justice O'Connor seemed to follow the Court's past statutory stare decisis analysis⁹⁴ in holding that *Roe*'s reliance interests outweighed any subsequent changes in the facts and law, as the *Roe* Court envisaged both.⁹⁵

⁸⁷ See Marshall, *supra* note 4, at 180.

⁸⁸ 505 U.S. 833 (1992) (holding that the doctrine of stare decisis requires reaffirmance of the essential holding of *Roe v. Wade*, 410 U.S. 113 (1973), recognizing a woman's right to have an abortion before fetal viability).

⁸⁹ Justice O'Connor joined by Justices Kennedy and Souter wrote the plurality opinion dealing with stare decisis and its impact on the *Roe* decision. See *Casey*, 505 U.S. at 840.

⁹⁰ See *id.* at 861.

⁹¹ *Id.* at 854.

⁹² *Id.* at 855.

⁹³ See *id.* at 869-70.

⁹⁴ See, e.g., *Payne v. Tennessee*, 501 U.S. 808 (1991).

⁹⁵ See *Casey*, 505 U.S. at 860-61.

B. *The Court's Treatment of Statutory Stare Decisis in Hubbard v. United States*

In *Hubbard v. United States*,⁹⁶ Justice Stevens ignored the Court's previous statutory stare decisis maxim that provided "considerations of *stare decisis* weigh heavily in the area of statutory [interpretation], where Congress is free to change this Court's interpretation of its legislation."⁹⁷ The facts of *Hubbard* seemed to present a clear application of *United States v. Bramblett*,⁹⁸ the Court's forty year precedent holding that a bankruptcy court is a "department of the United States"⁹⁹ within the meaning of 18 U.S.C. § 1001. In the years since *Bramblett*, legal scholars and the bar have been dissatisfied with the stifling effect this decision has had on courtroom freedom of expression.¹⁰⁰ In response to this concern, many lower federal courts crafted an exception to the statute's applicability by forging a doctrine called the judicial function exception.¹⁰¹ The judicial function exception provided an exclusion for false statements and similar misconduct occurring during the court's "'administrative' or 'housekeeping' functions."¹⁰²

Instead of endorsing the judicial function exception that limited *Bramblett*'s holding, the Court took the unprecedented step of overruling *Bramblett*.¹⁰³ The unexpectedness of the decision caught many Court observers by surprise because most legal scholars believed that *Bramblett*, even with the judicial function exception, was a workable decision.¹⁰⁴ The Court's fractured *Hubbard* decision announced the judgment in a plurality opinion that was less telling for the insipid subject matter of the statute than for the decision's complete

⁹⁶ 115 S. Ct. 1754 (1995) (plurality opinion). Mr. Hubbard was indicted under 18 U.S.C. § 1001 for falsehoods in unsworn papers filed in the Bankruptcy Court. *See id.* He was convicted after the United States District Court for the Eastern District of Michigan, relying on *United States v. Bramblett*, 348 U.S. 503 (1955), instructed the jury that a bankruptcy court is a "department of the United States" within the meaning of 18 U.S.C. § 1001. *See id.* The United States Court of Appeals for the Sixth Circuit affirmed and also held that the judicial function exception did not exist. *See id.*

⁹⁷ *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977).

⁹⁸ 348 U.S. 503 (1955).

⁹⁹ 18 U.S.C. § 1001 (1983 & Supp. V 1988).

¹⁰⁰ *See Hubbard*, 115 S. Ct. at 1758.

¹⁰¹ *See Morgan v. United States*, 309 F.2d 234 (D.C. Cir. 1962) (developing the judicial function exception because the court of appeals was troubled by the potential sweep of the statute).

¹⁰² *Id.* at 237.

¹⁰³ *See Hubbard*, 115 S. Ct. at 1765.

¹⁰⁴ *See id.*

abandonment of past statutory stare decisis analysis.¹⁰⁵ Indeed, Chief Justice Rehnquist complained in his dissent that the majority jettisoned a forty year precedent despite the plurality's admission that the *Bramblett* Court's reading of the statute was "not completely implausible."¹⁰⁶ The following is a summary and analysis of *Hubbard*'s plurality, concurring, and dissenting opinions dealing with statutory stare decisis.

1. *Justice Stevens and "Intervening Development of the Law"*

Justice Stevens, writing for a plurality of the Court, concluded that the statute, which criminalizes false statements and similar misconduct occurring "in any matter within the jurisdiction of any department or agency of the United States,"¹⁰⁷ did not apply to false statements made in judicial proceedings.¹⁰⁸ Justice Stevens began with a plain language interpretation¹⁰⁹ of the statute focusing on the words "department or agency."¹¹⁰ Justice Stevens concluded that because a bankruptcy court was neither a "department [n]or agency"¹¹¹ within the meaning of the statute, the statute did not apply to false statements made in judicial proceedings.¹¹² The need for a judicial function exception became extraneous after Justice Stevens delivered the part of the opinion that a majority of the Justices joined, which stated that the statute did not extend to the Judicial Branch.¹¹³

The Court's uneasiness with statutory stare decisis analysis bore itself out in that no one opinion garnered enough support to speak for a majority of the Justices.¹¹⁴ In part IV of the decision, Justice Stevens, joined by Justices Ginsberg and Breyer, began their statutory stare decisis analysis with a review of lower federal court decisions developing the judicial function exception.¹¹⁵ Justice Stevens seized on the early history of the judicial function exception, which was forged in *Morgan v. United States* only seven years after *Bramblett*

¹⁰⁵ See *id. passim*. The opinion also included a concurrence and a dissent that both dealt with statutory stare decisis. See *id.* at 1765–69.

¹⁰⁶ See *id.* at 1766.

¹⁰⁷ *Id.* at 1756 (citing 18 U.S.C. § 1001 (1983 & Supp. V 1988)).

¹⁰⁸ See *id.* at 1765.

¹⁰⁹ See *id.* at 1757–58.

¹¹⁰ See *id.* at 1756 (citing 18 U.S.C. § 1001).

¹¹¹ See *id.* (citing 18 U.S.C. § 1001).

¹¹² See *id.* at 1765.

¹¹³ See *id.*

¹¹⁴ See *id.* at 1754.

¹¹⁵ See *id.* at 1761.

was decided.¹¹⁶ Justice Stevens noted that the Court of Appeals for the District of Columbia Circuit that had decided *Morgan* was concerned with the potential sweep of the statute.¹¹⁷ Particularly because the statute prohibited concealment and covering up of material facts, as well as intentional falsehoods,¹¹⁸ the court of appeals pondered whether the statute might be interpreted to criminalize conduct that fell within the scope of reasonable advocacy.¹¹⁹ Justice Stevens went on to document the extensive entrenchment of the judicial function exception in the lower federal courts.¹²⁰

In part V of the decision, Justice Stevens focused on the difficult statutory stare decisis issue the case presented.¹²¹ Justice Stevens began by noting that "[i]t is . . . wise judicial policy to adhere to rules announced in earlier cases."¹²² Justice Stevens next trotted out the statutory stare decisis mantra that respect for precedent is strongest in the context of statutory interpretation because, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress has the power to amend what the Court has

¹¹⁶ See *Morgan v. United States*, 309 F.2d 234 (D.C. Cir. 1962).

¹¹⁷ See *id.* at 237.

¹¹⁸ See 18 U.S.C. § 1001 (1983 & Supp. V 1988).

¹¹⁹ "Does a defendant 'cover up' a material fact' when he pleads not guilty? Does an attorney 'cover up' when he moves to exclude hearsay testimony he knows to be true, or when he makes a summation on behalf of a client he knows to be guilty?" *Morgan*, 309 F.2d at 237 (alteration in original). The *Morgan* court further stated:

We are certain that neither Congress nor the Supreme Court intended the statute to include traditional trial tactics within the statutory terms conceals or covers up. We hold only, on the authority of the Supreme Court construction, that the statute does apply to the type of action with which appellant was charged, action which essentially involved the 'administrative' or 'housekeeping' functions, not the 'judicial' machinery of the court.

Id.

¹²⁰ See *Hubbard*, 115 S. Ct. at 1761-62; see also *United States v. Masterpol*, 940 F.2d 760, 766 (1991) (the judicial function exception was first articulated nearly 30 years ago); *United States v. Mayer*, 775 F.2d 1387, 1390 (1985) (per curiam) (recognizing the judicial function exception to 18 U.S.C. § 1001 by appellate decisions since 1962); *United States v. D'Amato*, 507 F.2d 26, 30 (1974) (holding that 18 U.S.C. § 1001 does not apply to a conviction arising out of a false affidavit offered in the course of a civil lawsuit).

¹²¹ See *Hubbard*, 115 S. Ct. at 1763.

¹²² *Id.* Justice Stevens went on to quote Justice Cardozo, reminding us that "[t]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him." *Id.* (quoting BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 149 (1921)).

done.¹²³ However, after paying homage to statutory stare decisis, Justice Stevens then ignored the doctrine in his stare decisis analysis in *Hubbard*.¹²⁴

Justice Stevens posed the stare decisis issue in *Hubbard* as presenting two conflicting paths.¹²⁵ On the one hand, stare decisis counsels adherence to the statutory interpretation of 18 U.S.C. § 1001 in *Bramblett*;¹²⁶ on the other hand, stare decisis argues in countenance of retaining the body of law that has limited the breadth of *Bramblett*.¹²⁷ Justice Stevens noted that it would be difficult to achieve both paths simultaneously.¹²⁸ Justice Stevens expounded that if the word “department”¹²⁹ included the federal courts, as the *Bramblett* Court held,¹³⁰ the judicial function exception could not be squared with the language of the statute.¹³¹ “A court is a court—and is part of the Judicial Branch—whether it is functioning in a housekeeping or judicial capacity.”¹³² Conversely, *Bramblett* could not remain good law if the Court adopted the judicial function exception.¹³³

Justice Stevens justified overruling *Bramblett*, and its forty years of statutory precedent, “because of a highly unusual ‘intervening development of the law’”¹³⁴ and also because “of the absence of significant reliance interests in adhering to *Bramblett*.”¹³⁵ According to Justice Stevens, “the highly unusual ‘intervening development of the law’” was the judicial function exception.¹³⁶ However, the judicial function exception had never achieved the status of an intervening development of the law.¹³⁷ At most, one could argue that the judicial function exception was a limited exception applicable only to a lower

¹²³ See *id.*

¹²⁴ See *id.* at 1763–65.

¹²⁵ See *id.* at 1763.

¹²⁶ See *id.*

¹²⁷ See *id.*

¹²⁸ See *id.*

¹²⁹ See *id.* at 1756 (citing 18 U.S.C. § 1001 (1983 & Supp. V 1988)).

¹³⁰ See *United States v. Bramblett*, 348 U.S. 503, 509 (1955).

¹³¹ See *Hubbard*, 115 S. Ct. at 1763 (stating that the judicial function exception has no vitality if the Court interprets 18 U.S.C. § 1001 so that it does not extend to conduct occurring in the lower federal courts).

¹³² *Id.*

¹³³ See *id.* The Court dismissed the government’s suggestion that a reconsideration of *Bramblett* was not fairly included in the question on which the Court granted certiorari. See *id.* at n.12.

¹³⁴ *Id.* at 1764 (citing *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989)).

¹³⁵ *Id.*

¹³⁶ See *id.*

¹³⁷ See *Patterson*, 491 U.S. at 173 (discussing the evolution of an intervening development of the law).

federal court's "'administrative' or 'housekeeping' function."¹³⁸ Justice Stevens bestowed upon the judicial function exception the status of a "competing legal doctrine,"¹³⁹ and thus gave to the judicial function exception the legitimacy of a settled body of law.¹⁴⁰ Justice Stevens stated that the reliance interests on *Bramblett* were "notably modest"¹⁴¹ because of the judicial function exception. However, as noted above, once the judicial function exception was shown in its true colors as an exception to 18 U.S.C. § 1001, not as an intervening development of the law,¹⁴² Justice Stevens's premise for overruling *Bramblett* lost its efficacy. Justice Stevens did not address the issue of congressional acquiescence or unacceptable consequences of past decisions applying *Bramblett*, nor did he attempt to examine past legislative history from the Congress that adopted the statute to determine its intentions.¹⁴³

2. Justice Scalia and the "Do Over"

Justice Scalia filed a concurrence¹⁴⁴ on the statutory stare decisis issue presented by 18 U.S.C. § 1001.¹⁴⁵ Justice Scalia began by noting the importance of stare decisis to the American way of life.¹⁴⁶ "Who ignores [stare decisis] must give reasons, and reasons that go beyond mere demonstration that the overruled opinion was wrong (otherwise the doctrine would be no doctrine at all)."¹⁴⁷ However, Justice Scalia did not follow his own words.

Justice Scalia avowed that his support for overruling *Bramblett* was due to

¹³⁸ See *Morgan v. United States*, 309 F.2d 234, 237 (D.C. Cir. 1962); *supra* text accompanying note 120.

¹³⁹ See *Hubbard*, 115 S. Ct. at 1764 (quoting *Patterson*, 491 U.S. at 173).

¹⁴⁰ See *id.*

¹⁴¹ See *id.* Justice Stevens only briefly supports his assertion that *Bramblett*'s reliance interests are "notably modest." See *id.* Chief Justice Rehnquist, in his dissent, chastises Justice Stevens for his superficial examination of *Bramblett*'s reliance interests. See *id.* at 1768 (Rehnquist, J., dissenting).

¹⁴² See *Patterson*, 491 U.S. at 173 (discussing that an exception to a statute's applicability in a particular instance does not imbue that exception with the status of an intervening development of the law, but instead it means that the statute does not apply in all situations where on the face of the statute it would; and noting that an exception to a statute should not be treated as an intervening development of the law).

¹⁴³ See *supra* text accompanying notes 31 and 55.

¹⁴⁴ Justice Scalia, in his concurrence in parts I–III and VI of the plurality opinion, as well as in his concurrence in the judgment of the Court, was joined by Justice Kennedy. See *Hubbard*, 115 S. Ct. at 1765–66 (Scalia, J., concurring).

¹⁴⁵ See *id.* at 1765 (Scalia, J., concurring).

¹⁴⁶ See *id.* (Scalia, J., concurring).

¹⁴⁷ *Id.* (Scalia, J., concurring).

its unacceptable consequences; however, he did not cite one decision where mischief from the statute lay.¹⁴⁸ While Justice Scalia did dismiss forty years of precedent with his concurrence in the judgment, he was more up front about it than Justice Stevens.¹⁴⁹ Justice Scalia did not hide behind the stare decisis nemesis of an intervening development of the law.¹⁵⁰ He avowedly stated that *Bramblett* had unacceptable consequences.¹⁵¹ He believed that the statute had no application to the Judicial Branch, and therefore, that the judicial function exception was irrelevant.¹⁵²

However, never has candidness been a panacea for careful judicial thought.¹⁵³ Justice Scalia surmised that had the *Bramblett* Court known the error of its ways it would have held that the statute did not apply to the Judicial Branch.¹⁵⁴ He next addressed the judicial function exception and its place in the stare decisis analysis.¹⁵⁵ He acknowledged that if the judicial function exception was adopted by the Court, then the need for overruling *Bramblett* would dissipate.¹⁵⁶ However, he quickly cast aside this solution and instead overruled *Bramblett* as inconsistent with the statute's language.¹⁵⁷

Justice Scalia declared that if the judicial function exception was adopted by the Court, it would not further one of the main goals of stare decisis, "avoiding 'an arbitrary decision in the courts.'"¹⁵⁸ Again, Justice Scalia did not show how

¹⁴⁸ See *id.* (stating that *Bramblett* produced unacceptable consequences; however, he failed to note any of these supposed unacceptable consequences).

¹⁴⁹ Justice Scalia forthrightly stated his dissatisfaction with the *Bramblett* decision, unlike Justice Stevens who attempted to hide his dissatisfaction with the *Bramblett* decision behind an incomplete stare decisis analysis.

¹⁵⁰ See *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989).

¹⁵¹ See *Hubbard*, 115 S. Ct. at 1765 (Scalia, J., concurring).

¹⁵² See *id.* (Scalia, J., concurring).

¹⁵³ See CARDOZO, *supra* note 122, at 152.

¹⁵⁴ However, saying something enough times does not make it true. Justice Scalia offers no legal authority for this hypothesis and indeed, this hypothesis cuts against Justice Scalia's stare decisis guidepost that "reasons go beyond mere demonstration that the overruled opinion was wrong." *Hubbard*, 115 S. Ct. at 1765. The *Bramblett* Court's holding concerning the applicability of the statute to the lower federal courts may be wrong, but Justice Scalia has failed to show that the decision has had unacceptable consequences. At most, Justice Scalia can show a judicial policy of limiting *Bramblett*'s applicability in lower federal courts to the judicial functions of its courts, as opposed to the administrative or housekeeping functions. See *Morgan v. United States*, 309 F.2d 234, 237 (D.C. Cir. 1962).

¹⁵⁵ See *Hubbard*, 115 S. Ct. at 1766 (Scalia, J., concurring).

¹⁵⁶ See *id.* (Scalia, J., concurring).

¹⁵⁷ See *id.* (Scalia, J. concurring); see also *id.* at 1757-58. Some support exists for Justice Scalia's view that "department or agency" does not include the lower federal courts. See *id.*

¹⁵⁸ See *id.* at 1766 (Scalia, J., concurring).

adopting the judicial function exception would have lead to arbitrary decisions in federal courts.¹⁵⁹ Justice Scalia concluded his concurring opinion with a brief discussion of the other goal of stare decisis, “preserving justifiable expectations.”¹⁶⁰ However, he summarily asserted that justifiable expectations would not have been threatened if *Bramblett* were overruled.¹⁶¹ He stated that “[t]hose whose reliance [interests] on *Bramblett* induced them to tell the truth . . . have no claim on our solicitude.”¹⁶² He went on to provide that while a few miscreants may go free, it is a small price to pay for overruling this troublesome decision.¹⁶³ He seemed to be settling in on the nefarious aspects of the *Bramblett* decision that the judicial function exception attempted to deal with, namely potential harm to trial advocacy,¹⁶⁴ and to be willing to forego the positive aspect of the decision, namely requiring participants to be truthful during the course of a judicial proceeding.¹⁶⁵

3. Chief Justice Rehnquist and the True Believers

Chief Justice Rehnquist’s dissent¹⁶⁶ called the plurality to task for replacing “*Bramblett*’s plausible, albeit arguably flawed, interpretation of the statute with its own ‘sound’ reading.”¹⁶⁷ He gave short shrift to the reasons offered by Justice Stevens in part V of his plurality opinion and the justification offered by Justice Scalia in his concurring opinion.¹⁶⁸

Chief Justice Rehnquist chided Justice Stevens for his “intervening development [of] the law”¹⁶⁹ assault on stare decisis and correctly pointed out

¹⁵⁹ See *id.* (Scalia, J., concurring). Justice Scalia offers no citation to support his assertion. See *id.*

¹⁶⁰ See *id.* (Scalia, J., concurring).

¹⁶¹ See *id.* (Scalia, J., concurring).

¹⁶² *Id.* (Scalia, J., concurring) (noting that persons should not be rewarded for something that they were legally obligated to do).

¹⁶³ See *id.* (Scalia, J., concurring).

¹⁶⁴ See *id.* (Scalia, J., concurring); see also *id.* at 1761–62 (Justice Stevens discussing the possible nefarious ramifications of the *Bramblett* decision on the defense bar’s trial strategies.).

¹⁶⁵ See *id.* at 1766 (Scalia, J., concurring).

¹⁶⁶ Chief Justice Rehnquist was joined in his dissent by Justices O’Connor and Souter. See *id.* (Rehnquist, C.J., dissenting). Justice O’Connor and Justice Souter are the only two Justices in the *Casey* and *Hubbard* decisions that voted to uphold both *Roe* and *Bramblett* based on the doctrine of stare decisis.

¹⁶⁷ *Id.* at 1766–67 (Rehnquist, C.J., dissenting); see, e.g., *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977).

¹⁶⁸ See *Hubbard*, 115 S. Ct. at 1766–67 (Rehnquist, C.J., dissenting).

¹⁶⁹ See *id.* at 1766 (Rehnquist, C.J., dissenting).

that Justice Stevens was using lower federal court opinions as the “basis for disavowing, not the aberrant court of appeals decisions, but, *mirabile dictu* our own decision.”¹⁷⁰ He admonished the plurality that this line of reasoning, quite apart from supporting the doctrine of stare decisis, actually subverted the very foundation on which stare decisis was built, “a hierarchical court system.”¹⁷¹ He also took the plurality to task for its belief that there had been no reliance interests on the *Bramblett* decision.¹⁷²

He stated that the *Hubbard* decision departed radically from the previous application of the intervening development of the law challenge to stare decisis,¹⁷³ whereby “intervening development [of] the law” meant that a court of appeals had incorrectly interpreted a Court decision.¹⁷⁴ He next described the Court’s certiorari process and the dearth of cases the Court could select.¹⁷⁵ He then went on to delineate the ramifications of this highly selective process.¹⁷⁶ He warned of the inducement to courts of appeals that *Hubbard* sent: if a lower court was unhappy with a Court decision, then that court could build a body of case law contrary to the Court’s, and this contrary body of case law could serve as a ground for overruling the Court decision.¹⁷⁷ The

¹⁷⁰ *Id.*, see also *Patterson*, 491 U.S. at 172 (Stare decisis is “a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon ‘an arbitrary discretion.’”); THE FEDERALIST NO. 78, at 490 (Alexander Hamilton) (Henry Cabot Lodge ed., 1888) (“To avoid an arbitrary discretion in the Courts, it is indispensable that [judges] should be bound by strict rules and precedents . . .”)

¹⁷¹ *Hubbard*, 115 S. Ct. at 1766 (Rehnquist, C.J., dissenting); see also *supra* note 4 and accompanying text.

¹⁷² See *id.* (Rehnquist, C.J., dissenting).

¹⁷³ See *id.* at 1767 (Rehnquist, C.J., dissenting); see, e.g., *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); *Andrews v. Louisville & Nashville R.R.*, 406 U.S. 320 (1972). The *Shearson* and *Andrews* decisions delineate that intervening developments concern the decisional law of the Supreme Court, not of the lower federal courts. See *Hubbard*, 115 S. Ct. at 1767 (Rehnquist, C.J., dissenting).

¹⁷⁴ See *Hubbard*, 115 S. Ct. at 1767 (Rehnquist, C.J., dissenting); see also *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 743–44 (1977) (holding that the Court would refuse to follow a line of lower federal court decisions that had carved out an exception from one of the Court’s precedents).

¹⁷⁵ See *Hubbard*, 115 S. Ct. at 1767 (Rehnquist, C.J., dissenting).

¹⁷⁶ See *id.* (Rehnquist, C.J., dissenting).

¹⁷⁷ See *id.* (Rehnquist, C.J., dissenting). This doomsday prediction is not likely to happen. However, Chief Justice Rehnquist does point out that the Court’s power is based on respect for the Court’s decisions, and that if this respect is undermined, then judges of the courts of appeals may be less inclined to follow unpopular Court precedents with which they disagree. See *id.* This could result in a collapse of vertical stare decisis and the stability that the American justice system has known for over two hundred years. See *id.*; see also *supra*

unfortunate message Justice Stevens's transmogrified intervening development of the law theory sent was one of irreverence for the venerable concept of stare decisis and a lack of respect for the Court.¹⁷⁸

Chief Justice Rehnquist challenged the plurality's second justification in defense of its decision to overrule *Bramblett*, namely that there has been no reliance interest on the *Bramblett* decision.¹⁷⁹ He pointed out that just because the government had expressed a preference for proceeding under statutes other than 18 U.S.C. § 1001¹⁸⁰ did not mean that the government had forfeited any claim or right of reliance to prosecute under 18 U.S.C. § 1001.¹⁸¹

He chastised Justice Scalia for not following the Court's statutory stare decisis view that "[t]he opinion of one [J]ustice that another's view of a statute was wrong, even really wrong, does not overcome the institutional advantages conferred by adherence to *stare decisis* in cases where the wrong is fully redressable by a coordinate branch of government."¹⁸² Chief Justice Rehnquist concluded by iterating his belief that the judicial function exception was not an intervening development of the law sufficient to warrant overruling a forty-year precedent.¹⁸³

IV. THE *PATTERSON* TRADITIONAL RATIONALES FOR DEPARTING FROM THE DOCTRINE OF STARE DECISIS AS APPLIED TO *HUBBARD*

The Court in *Patterson v McLean Credit Union*¹⁸⁴ formulated three traditional rationales to be applied when a court examines a stare decisis issue. The three traditional rationales, any one of which is sufficient to depart from the doctrine of statutory or constitutional stare decisis, are as follows: (1) Whether the decision has "been undermined by subsequent changes or development [of] the law";¹⁸⁵ (2) whether the decision "may be a positive

text accompanying note 4.

¹⁷⁸ See *Hubbard*, 115 S. Ct. at 1767

¹⁷⁹ See *id.* at 1768.

¹⁸⁰ See *id.* at 1756 (citing 18 U.S.C. § 1001 (1983)).

¹⁸¹ See *id.* at 1768.

¹⁸² *Id.* at 1769.

¹⁸³ See *id.* (stating that "*Bramblett* governs this case, and if the rule of that case is to be overturned it should be at the hands of Congress, and not of this Court"). But see *supra* text accompanying notes 31 and 55 (explaining that congressional acquiescence may not be a valid theory on which to base congressional support for a Court decision because Congress may be unaware of the Court decision, or Congress may be unable to overrule the Court decision due to legislative posturing or lack of votes).

¹⁸⁴ 491 U.S. 164 (1989).

¹⁸⁵ *Id.* at 173.

detriment to coherence and consistency in the law, either because of inherent confusion created by an unworkable decision . . . or because the decision poses a direct obstacle to the realization of important objectives embodied in other laws”;¹⁸⁶ or (3) whether the decision has become “outdated and after being ‘tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare.’”¹⁸⁷

The Court in *Hubbard* did not address the three traditional rationales for departing from stare decisis as formulated by the Court just six years before in *Patterson*.¹⁸⁸ If the Court had applied these three traditional rationales for departing from stare decisis, it is possible that the Court would have decided *Hubbard* differently.¹⁸⁹

A. The First Patterson Rationale

The first rationale, whether the decision has “been undermined by subsequent changes or development [of] the law,”¹⁹⁰ presents the question posed by Justice Rehnquist in his dissent: upon whose reference point are supposed subsequent changes or development of the law recognized?¹⁹¹

If the analysis proceeds under Justice Stevens’s plurality opinion,¹⁹² then ample support exists for concluding that *Bramblett* has been undermined by subsequent decisions.¹⁹³ However, if the analysis proceeds under Justice Rehnquist’s dissent, then little or no support exists for overruling *Bramblett*.¹⁹⁴

¹⁸⁶ *Id.* (internal citations omitted) (footnote omitted).

¹⁸⁷ *Id.* at 174 (footnote omitted) (quoting *Runyon v. McCraty*, 427 U.S. 160, 191 (1976) (Stevens, J., concurring)).

¹⁸⁸ See *Hubbard*, 115 S. Ct. at 1754 *passim*.

¹⁸⁹ While it is difficult to isolate and change one factor (stare decisis analysis) and draw conclusions from that change, the fractured decision in *Hubbard* evidences that the support for overruling *Bramblett* was not especially strong. If the *Hubbard* Court had undertaken a thorough examination of stare decisis by applying the *Patterson* rationales to *Bramblett*, it is likely that *Bramblett* would not have been overruled.

¹⁹⁰ *Patterson*, 491 U.S. at 173.

¹⁹¹ See *supra* Part III.B.3 (discussing Chief Justice Rehnquist’s position that analysis of intervening developments should be from the Court’s reference point).

¹⁹² See *supra* Part III.B.1 (discussing Justice Stevens’s position that intervening developments should encompass lower federal court decisions).

¹⁹³ See cases cited *supra* note 120.

¹⁹⁴ While Chief Justice Rehnquist did not use the exact language of the *Patterson* decision, he did correctly point out that the “intervening development of the law” exception to following the doctrine of stare decisis depends on intervening developments in the case law of the Court, not of lower federal courts. See *Hubbard*, 115 S. Ct. at 1766; see also *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 743–44 (1977) (refusing to follow a line of lower federal

The key to analyzing this conundrum is to examine what court decided the precedent at issue. If, as in *Bramblett*, the Supreme Court decided the case, then it should be the Court that decides whether intervening developments of its case law have sufficiently sapped the strength of the precedent to allow the precedent's overruling.

Applying the first rationale, whether the decision has "been undermined by subsequent changes or development [of] the law,"¹⁹⁵ to the analysis of *Bramblett* as developed by Chief Justice Rehnquist does not lead to a departure from the doctrine of stare decisis. The first rationale depends on intervening developments to sap strength from the vitality of a precedent. However, the Court is a court of last resort,¹⁹⁶ and therefore, as a matter of policy, does not look to lower court decisions for guidance.¹⁹⁷ The Court has not addressed the issue of whether a bankruptcy court is a department of the United States¹⁹⁸ within the meaning of 18 U.S.C. § 1001 since *Bramblett*. Therefore, under the first rationale of *Patterson*, no intervening developments have occurred since *Bramblett* sufficient to warrant departing from stare decisis and overruling *Bramblett*.

B. The Second Patterson Rationale

The second *Patterson* rationale for departing from stare decisis is whether the decision is "a positive detriment to coherence and consistency in the law, either because of an inherent confusion created by an unworkable decision or because the decision poses a direct obstacle to the realization of important objectives embodied in other laws."¹⁹⁹ Of the three rationales, the second rationale is the most nebulous and hard to implement. The key to applying this rationale is to determine a point of reference to measure whether the decision has become unworkable in the court system. Do you measure the unworkability of the decision from the Court's point of reference, or the point of reference of the lower federal courts who are more often confronted with the

court decisions which had carved out an exception to one of the Court's precedents). See generally Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CAL. L. REV. 1309 (1995) (arguing that the Court should only look to its precedent when determining if an intervening development of the law has developed).

¹⁹⁵ *Patterson*, 491 U.S. at 173.

¹⁹⁶ See *supra* note 5 (discussing that the Court grants certiorari as a matter of discretion, not as a matter of right).

¹⁹⁷ See *supra* notes 4-7 (arguing that under the doctrine of stare decisis the Court does not usually look to lower federal court decisions for guidance).

¹⁹⁸ See *Hubbard*, 115 S. Ct. at 1756 (quoting 18 U.S.C. § 1001 (1983)).

¹⁹⁹ *Patterson*, 491 U.S. at 173.

alleged unworkability everyday²⁰⁰

The argument for the lower federal courts determining the unworkability of a decision is that these courts are on the front line of the judiciary and are more often confronted with the dilemma of unworkable tests, rationales, and guidelines. Therefore, it is argued that the lower federal courts should be able to determine whether a Court decision is unworkable and, hence, not protected by stare decisis.

However, the American common law system is built upon the foundation of vertical stare decisis.²⁰¹ While vertical stare decisis is an important concept, the Court should consider lower federal court decisions in determining the unworkability of a Court decision.²⁰²

The judicial function exception developed seven years after *Bramblett* was decided.²⁰³ Some scholars argue that the early date for the development of an exception to *Bramblett* signaled its unworkability.²⁰⁴ However, the Court did not grant certiorari in *Morgan*.²⁰⁵ Therefore, one can surmise that the Court was not concerned that an exception to *Bramblett* was forged by a lower federal court.²⁰⁶ Furthermore, in subsequent cases developing the judicial function exception, the Court did not grant certiorari.²⁰⁷ The Court not granting certiorari to lower federal court decisions developing the judicial function exception is not dispositive that the Court thought the *Bramblett* decision was

²⁰⁰ See cases cited *supra* note 120 (pointing out that the lower federal courts have confronted the issue presented in *Bramblett* many times since the Court's decision in *Bramblett* while the Court did not grant certiorari on the issue till forty years after *Bramblett* was decided).

²⁰¹ See *Dorf*, *supra* note 4, at 2024 (arguing that vertical stare decisis is the linchpin of the American judicial system); *supra* note 4 and accompanying text.

²⁰² See, e.g., *Continental T.V. Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 47-48 & n.14, 59 (1977) (discussing how lower federal courts had "struggled to distinguish or limit [a decision of the Court] in ways that [were] a tribute to judicial ingenuity" before effectively overruling that decision); *Swift & Co. v. Wickham*, 382 U.S. 111, 124-25, 28-29 (1965) (discussing how lower courts had "quite evidently sought to avoid dealing with [a decision of the Court] or [had] interpreted it with uncertainty" before effectively overruling that decision).

²⁰³ See *Morgan v. United States*, 309 F.2d 234, 237 (D.C. Cir. 1962).

²⁰⁴ See generally Alan R. Romero, Note, *Interpretative Directions in Statutes*, 31 HARV J. ON LEGIS. 211, 237 n.93 (1994) (arguing that the *Bramblett* Court did not correctly interpret 18 U.S.C. § 1001).

²⁰⁵ See *Morgan v. United States*, 373 U.S. 917 (1963).

²⁰⁶ See *supra* note 67 and accompanying text (discussing the dearth of cases that the Court can grant certiorari in and the danger of inferring that by not granting certiorari the Court approves of the lower federal court decision); cf. *supra* Parts I.B.1, I.B.2, and I.B.3 (discussing the danger of inferring congressional acquiescence from Congress's inaction). The two situations are somewhat analogous.

²⁰⁷ See cases cited *supra* note 120.

workable. However, the inaction by the Court could signal its acquiescence in the workability of the *Bramblett* decision “in spite of”²⁰⁸ the judicial function exception.²⁰⁹

C. The Third Patterson Rationale

The third *Patterson* rationale for departing from stare decisis is whether the decision has become “outdated and after being ‘tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare.’”²¹⁰ The language of the rationale, whether the decision is “outdated,”²¹¹ overlaps with the workability analysis in Part IV.B.²¹² Therefore, the focus of application for the third rationale will be the fairness aspect as denoted by the language “sense of justice or social welfare.”²¹³

Justice Stevens’s plurality opinion discussed whether *Bramblett* discouraged trial advocacy.²¹⁴ Justice Stevens began by analyzing the *Morgan* court’s opinion’s discussion of the potential sweep of 18 U.S.C. § 1001.²¹⁵ The *Morgan* court noted that the statute prohibited concealment and covering up of material facts, as well as intentional falsehoods, and questioned whether the statute could be interpreted to criminalize behavior that fell within the parameters of reasonable trial advocacy.²¹⁶ However, after raising the specter that *Bramblett* unreasonably curtailed trial advocacy, Justice Stevens adopted the holding of the *Morgan* court that neither Congress nor the *Bramblett* Court intended the statute to preclude reasonable trial advocacy.²¹⁷

In a more general sense, the requirement that parties not conceal facts or

²⁰⁸ See *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 316 (1976) (per curiam) (emphasis added). The Court drew the distinction that the statute discriminating against Mr. Murgia was upheld *in spite of* 14th Amendment protections not *because of* 14th Amendment protections. See *id.* The language, *in spite of not because of*, is a useful writing tool to draw attention to contradistinctions.

²⁰⁹ But see *supra* note 206 and accompanying text.

²¹⁰ *Patterson v. McLean Credit Union*, 491 U.S. 164, 174 (1989) (quoting *Runyon v. McCrary*, 427 U.S. 160, 191 (1996) (Stevens, J., concurring)).

²¹¹ See *id.*

²¹² Whether a decision is outdated is analogous to whether a decision is workable. The discussion in Part IV.B supports the workability of the *Bramblett* decision.

²¹³ *Patterson*, 491 U.S. at 174 (quoting *Runyon*, 427 U.S. at 191 (Stevens, J., concurring)).

²¹⁴ See *Hubbard v. United States*, 115 S. Ct. 1754, 1758–61 (1995).

²¹⁵ See *id.* at 1761.

²¹⁶ See *id.* at 1762.

²¹⁷ See *id.*

mislead a court does not seem to cut against the grain of justice.²¹⁸ 18 U.S.C. § 1001 criminalizes false statements occurring in any matter within the jurisdiction of any department of the United States.²¹⁹

The Court in *Bramblett* held that the word “department,” in the statute, meant the “executive, legislative and judicial branches of government.”²²⁰ Therefore, *Bramblett*’s conviction under the statute was affirmed because his falsehood was directed to an office within the Legislative Branch.²²¹ *Bramblett*’s defense that he could not be convicted under the statute because his falsehood was directed to the Legislative Branch rings hollow.²²² Analyzed in light of forty years experience, *Bramblett*’s holding does not seem to be “inconsistent with the sense of justice or with the social welfare.”²²³

None of the three *Patterson* rationales for departing from stare decisis lend support to overruling *Bramblett*. The first rationale is not triggered because the Court has had no intervening development of the law affecting *Bramblett*.²²⁴ The second rationale is not invoked because the decision has not become unworkable.²²⁵ The third rationale is not implicated because the *Bramblett* decision is not inimical to fairness and a sense of justice.²²⁶

None of the three separate opinions in *Hubbard* applied the *Patterson* rationales.²²⁷ However, the *Patterson* rationales for departing from stare decisis provide a framework for the Court when analyzing whether to overrule its earlier precedent. Furthermore, the *Patterson* rationales allow the Court to thoroughly analyze different aspects of the earlier precedent and not myopically focus on one aspect of the precedent. The preceding application of the three *Patterson* rationales to the *Bramblett* precedent at issue in *Hubbard* strongly

²¹⁸ See discussion *supra* Part III.B.2. Justice Scalia states that those persons who told the truth in reliance on *Bramblett* have no claim to the Court’s solicitude and that those persons were merely doing what was required of them under 18 U.S.C. § 1001. See *id.* However, with the Court overruling *Bramblett* these persons will not now be required to tell the truth in situations previously covered under 18 U.S.C. § 1001. Justice Scalia did not suggest a solution for this problem.

²¹⁹ See *United States v. Bramblett*, 348 U.S. 503, 509 (1955)

²²⁰ *Id.*

²²¹ See *id.*

²²² See *supra* note 218 and accompanying text.

²²³ *Patterson v. McLean Credit Union*, 491 U.S. 164, 178 (1989); see also *supra* note 218 and accompanying text.

²²⁴ See *Hubbard v. United States*, 115 S. Ct. 1754, 1767 (Rehnquist, C.J., dissenting) (Neither the Court nor Congress has addressed 18 U.S.C. § 1001 in the forty years since *Bramblett* was decided.); see also discussion *supra* Part IV.A.

²²⁵ See discussion *supra* Part IV.B.

²²⁶ See discussion *supra* Part IV.C.

²²⁷ See *Hubbard*, 115 S. Ct. *passim*.

suggests that if the Court had analyzed *Bramblett* under this framework, then the Court might have affirmed *Bramblett*.

V. CONCLUSION

Nineteenth century Great Lakes' navigators relied on the beacon in the Marblehead Lighthouse²²⁸ to safely guide them through the tumultuous storms of Lake Erie and around the treacherous rocks of Marblehead into the calm and safety of Sandusky Harbor. Likewise, a flexible doctrine of stare decisis has guided the Court through turbulent times from *Plessy v. Ferguson*²²⁹ to *Brown v. Board. of Education*²³⁰ and from *Adkins v. Children's Hospital*²³¹ to *West Coast Hotel Co. v. Parrish*.²³² However, the twentieth century has brought sophisticated navigational equipment to ships, such as radar and global positioning systems, as well as improved weather forecasting, alleviating the need for lighthouses such as Marblehead. While the Marblehead beacon still shines a path to safety, its heyday is past; does a similar fate await stare decisis?²³³

The Court by choosing not to apply the three traditional rationales of *Patterson* is not being true to the doctrine of stare decisis.²³⁴ The recent decision in *Hubbard* is a signal to the public that something is amiss. To correct the situation, the Court needs to follow the three traditional rationales

²²⁸ The Marblehead Lighthouse is one of the oldest lighthouses in operation on the Great Lakes. The lighthouse is located on the shore of Lake Erie in Marblehead, Ohio.

²²⁹ 163 U.S. 537 (1896) (requiring separate but equal accommodations aboard passenger trains for African-Americans).

²³⁰ 347 U.S. 483 (1954) (overruling the separate but equal doctrine of *Plessy v. Ferguson*).

²³¹ 261 U.S. 525 (1923) (striking down on constitutional grounds, as an interference with freedom of contract, a federal statute fixing minimum wages for women and children in the District of Columbia).

²³² 300 U.S. 379 (1937) (overruling *Adkins*, and in the process *Lochner v. New York*, 98 U.S. 45 (1905), and holding that freedom of contract is a qualified and not absolute right because liberty, guaranteed by the Constitution, implies absence of arbitrary restraint and not immunity from reasonable regulations and prohibitions imposed in the interests of the community).

²³³ Will stare decisis become a judicial relic, outliving its usefulness but kept around as a historical reference and teaching guide?

²³⁴ See *Hubbard v. United States*, 115 S. Ct. 1754, 1765 (Justice Stewart writing for the plurality overruled *Bramblett*, in spite of stare decisis.); *Planned Parenthood v. Casey*, 505 U.S. 833, 861 (1992) (Justice O'Connor, writing for the plurality, upheld *Roe* because of stare decisis.); see also *supra* note 208 and accompanying text (discussion of *in spite of not because of* language of *Murgia*).

formulated in *Patterson*²³⁵ whenever a constitutional or statutory precedent presents itself for review before the Court.²³⁶

With the recent *Hubbard* decision as a backdrop, the Court is at a crossroads in the application of the doctrine of stare decisis. The Court can use the three traditional rationales of *Patterson* as a beacon to shine light on the precedent, allowing the Court to determine if the precedent still has vitality under stare decisis.²³⁷ Or the Court, as it did in *Hubbard*, can decline to apply the three traditional rationales of *Patterson* and, thus, examine the precedent in the dark without the benefit of the light that the *Patterson* rationales shed on the issue of stare decisis. Nothing less than the future of the American judicial system, with peoples' reliance interests and faith in the law being applied consistently to them now and in the future, hangs in the balance.

²³⁵ *Patterson v. McLean Credit Union*, 491 U.S. 164, 174 (1989) (examining three rationales for departing from stare decisis.); see discussion *supra* Part IV

²³⁶ See Marshall, *supra* note 4, at 193 (discussing the importance of the Court's statutory stare decisis analysis as a guide to the lower federal courts).

²³⁷ See discussion *supra* Part IV

